Supreme Court, U.S.
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No. 93-1118

In The
Supreme Court of the United States

October Term, 1993

WESTON CONTROLS, a division of Fairchild Weston Systems, and SCHLUMBERGER, LTD.

Petitioners,

vs.

JOAN PALMIERO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Employer can in good faith raise the issue of the retroactive application of the jury trial provisions of the Civil Rights Act of 1991 where the Employer formally opposed Employee's request for non-jury trial and stipulated on the record to a trial by jury?

2. Whether the Employer has waived issues relating to the adequacy of the trial court's instructions to the jury which charge, incidentally, was consistent with this Court's holding in *St. Mary's Center v. Hicks*, 509 U.S. ___, 113 S. Ct. 2742, 125 L.Ed. 2d 4097 (1993)?

3. Whether the Employer has waived issues relating to the adequacy of the trial court's instructions to the jury on a post-trial assertion of a "mixed motives" defense where the defense was never raised at trial?

4. Whether the courts below erred in allowing counsel fees after careful review of the record and proper application of this Court's standard enunciated in *Webb v. County Board of Education*, 471 U.S. 234, 105 S. Ct. 1923, 85 L.Ed. 2d 233 (1985)?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Employee filed her action on August 12, 1988, in the District Court under the ADEA and Title VII and also raised a pendent state claim for negligent misrepresentation.

On August 20, 1991, Employee filed a Motion to Bifurcate the Title VII claim from the ADEA and state tort claim. The Employee requested the District Court to allow the ADEA claim to proceed to trial by jury with the Title VII claim to follow with evidence being presented directly to the Court on the gender claim. The Employer vigorously opposed the motion and the parties stipulated for all issues to be tried to the same jury.

On September 24, 1991, the case proceeds to trial and Employee submitted both "direct" and "circumstantial" evidence to support her statutory claims of discrimination. Overwhelming evidence was submitted by the employee to establish not only that the Employer's proffered reason for the termination was pretextual; but also that the employee's age was a determining factor in her discharge.

The District Court instructed the jury on several occasions during the course of his charge that not only was it the employee's burden to establish that the employer's proffered reason was pretextual but also that age was a determinant factor in her termination. As emphasized by the District Court: "If she fails to do so and if you feel the reasons for her termination did not include age as a determinant factor then the Defendant would be entitled to a verdict at your hands on that phase of the case."

Also, during the course of the trial, Employer never put forth a "mixed motives" defense nor did the Employer request any such jury instruction.

The jury found as follows: that age was a determining factor in the Employer's decision to terminate the Employee's employment; that the Employer willfully discriminated against the Employee because of her age; that sex did not make a difference with respect to the Employee's termination; that sex made a difference with respect to Employee's promotions; that sex did not make a difference with respect to the Employee's salary; and that the Employer made a negligent misrepresentation to the Employee.

The jury awarded to Employee $548,652. Thereafter, the Employee petitioned the Court for counsel fees. Detailed documentation was submitted by Employee's counsel to support the attorney fee claim, including but not limited to

detailed time slips; the monthly calendars of counsel evidencing time expended on the case; and reconstructed records specifically itemizing categories of work performed and time expended. The District Court awarded the Employee $206,395 in counsel fees and an additional $26,100.27 in costs.

The Third Circuit summarily affirmed the judgments of the District Court.

REASONS FOR DENYING THE WRIT

I.

THE JURY TRIAL PROVISION OF THE CIVIL RIGHTS ACT OF 1991 IS NOT APPLICABLE WHERE THE EMPLOYER HAD IN FACT OPPOSED EMPLOYEE'S REQUEST FOR A NON-JURY TRIAL AND FURTHER STIPULATED TO A TRIAL BY JURY

The Employer cannot credibly assert that the jury trial provision of the Civil Rights Act of 1991 somehow impacts upon this case. This case was tried to a jury in September of 1991, several months before the enactment of the Civil Rights Act of 1991. This Court has already ruled that Congress did not intend to upset cases tried under the law at the time of trial. See, *Bennett v. New Jersey*, 470 U.S. 632, 105 S. Ct. 1555, 84 L.Ed. 2d 572 (1985).

Additionally, Employee emphasizes that Employer never requested the trial court to retroactively apply the jury trial provision of the Civil Rights At of 1991. It is puzzling why Employer now urges this Court to grant certiorari to consider this issue for the resulting decision would not impact on the instant case. The Employer sought a jury trial on the Title VII issues of this case.

Moreover, the Employer cannot, in good faith, assert that Employee sought from the District Court retroactive application of the Civil Rights Act of 1991. Additionally, if the jury trial provisions of the Civil Rights Act of 1991 were found to be applicable, the availability of a jury trial is consistent with what actually transpired in this matter. If the jury trial provision was found not to be retroactive to an already tried case, the position taken by the Employer prior to trial opposing Employee's request for "non-jury trial" and stipulating on the record to a jury trial remains uncontradicted.

Employee asserts that Employer is misleading this Court by seeking to frame their request for a Writ of Certiorari on the issue without articulating to the Court their position actually taken on the matter at the time of trial.

II.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING EMPLOYEE'S BURDEN OF PROOF IN AN ADEA CLAIM CONSISTENT WITH THE COURT'S HOLDING IN *ST. MARY'S HONOR CENTER V. HICKS*, 61 USLW 4782, 113 S.CT. 2742, 125 L.ED.2D 407 (1993)

Employer again attempts to deliberately mislead this Court into granting a Writ of Certiorari on an issue that is not supported in the record by any fact or law.

Employer suggests that the Court below did not require Employee to establish that Employer's reason for the discharge was false and that discrimination was the real reason for the discharge. Employee submits that a reading of the Trial Court's instruction to the jury on the law of the case belies Employer's contention. The District Court, on several

occasions throughout the charge stated essentially, "If she fails to do so [prove pretext] *and* if you find the reasons for her termination did not include age as a determinant factor then the Defendant would be entitled to a verdict at your hands in this part of the case."

Moreover, at the time of trial Employer did not lodge any objection to the Court's instruction relating to the content thereof.

Accordingly, Employee submits that Employer's objection arising out of the *Hicks* decision is another attempt to frame their request for a Writ of Certiorari on an issue that is not properly preserved in the record. Also, the District Court charge to jury was compatible with *Hicks* in all respects.

III.

AN EMPLOYER CANNOT RAISE ON APPEAL "A MIXED MOTIVES" DEFENSE WHERE EVIDENCE OF THE DEFENSE WAS NOT PRESENTED TO THE FACT FINDER NOR DID EMPLOYER REQUEST FROM THE TRIAL COURT "A MIXED MOTIVES" INSTRUCTION TO THE JURY

Employer now raises for the first time it's contention that if the Employee's case is categorized as a mixed motives case, the jury charge was inadequate in that "the charge did not advise the jury that the Employer's lawful motivation could be a defense even if the Employer also was motivated unlawfully, under the mixed motives analysis established by *Price Waterhouse*." (See, Petition for Writ of Certiorari at Page 10).

Conversely, Employer argues that if Employee's case is characterized as a pretext case, the District Court should not have charged the jury to find for the employee if age were "at least one of the determining factors" in the decision to discharge.

Employee submits that if the case is categorized under either of the above scenarios (pretext versus mixed motives), Employer cannot now advance either argument because it failed to preserve the issue in the courts below by lodging an objection at the appropriate time.

Additionally, if the relevant portion of the court's jury instructions is analyzed in a pretext case context, the charge meets this Court's approved standard as outlined in *Hazen Paper Company v. Biggins*, 61 USLW 4323, 113 S.Ct. 1701, 123 L.Ed. 2d 338 (1993). As Justice O'Connor stated in *Hazen*:

> **"Whatever the employer's discretionary process, a disparate treatment claim cannot succeed under the employer's protected trait actually played a role in that process and had a determinative influence on the outcome." *Id.* at 1703**

Accordingly, this Court should not grant a writ of certiorari with respect to this matter for the record itself does not support the issue as framed by the Employer. Moreover, the lower court's charge to the jury was proper when reviewed under existing case law.

IV.

THE COURTS BELOW WERE CORRECT IN AWARDING COUNSEL FEES FOR ALL HOURS REQUESTED UPON REVIEW OF DETAILED DOCUMENTATION PRODUCED TO SUPPORT TIME EXPENDED

Employer argues that this Court should grant a Writ of Certiorari to resolve a conflict among the Courts of Appeal whether contemporaneous time records are "required" or merely "preferred". Employee submits that this Court has previously addressed this issue and did not mandate contemporaneous time records but instead stated "[c]ontemporaneously recorded time sheets are the preferred practices." *Webb v. County Board of Education*, 471 U.S. 234, 238 N.6, 105 S.Ct. 1923, 1926 N.6, 85 L.Ed. 2d 233 (1985).

Employee contends that Employer's position on this issue is not supported in fact or by existing law. The legal framework in determining an attorney fee(s) award provides that the party seeking attorney fees is reasonable. To meet it's burden, the fee petitioner must submit evidence supporting the hours worked and rates claimed. *Hensley v. Eckenhart*, 461 U.S. 424, 533, 103 S.Ct. 1993, 1939, 176 L.Ed. 2d 40 (1983).

In the instant case, Employee submitted a detailed fee application exhibiting dates for work performed and explicit descriptions of the nature of the work performed. Moreover, Employer was given opportunity to conduct discovery into the fee application, including depositions of Employee's counsel.

In *Frank Music Corp. v. Metro-Goldwin-Mayer*, 886 F.2d 1545 (9th Cir. 1989), *cert. denied*, 494 U.S. 1017, 110 S.Ct. 1321, 108 L.Ed. 2d 496 (1990), this Court held that "the

lack of contemporaneous records does not justify an automatic reduction in the hours claimed, but such hours should be credited only if reasonable under the circumstances and supported by other evidence such as testimony or secondary documentation." *Id.* at 1557.

Accordingly, the Petition for Writ of Certoriari should be denied on this issue.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully Submitted,

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